No. 72910-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

REYNALDO REDMOND,

Petitioner.

ON REVIEW FROM THE COURT OF APPEALS, DIVISION ONE

SUPPLEMENTAL BRIEF OF PETITIONER REDMOND

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2. An accused has the constitutional right to confront the witnesses against him. Where hearsay is offered for a non-hearsay purpose and a party requests a limiting instruction, this Court has required a limiting instruction to "curtail abuse."[1] Should inadmissible hearsay that is argued to prove the truth of the matter asserted be excluded, or in the alternative, should a limiting instruction be given when one is requested by the defense?

3. Did the admission of medical records containing a graphic and unmistakeable attribution of fault, where the attribution was not pertinent to treatment, deprive Mr. Redmond of a fair trial?

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[1] State v. Parr, 93 Wn.2d 95, 98-99, 606 P.2d 263 (1980).

B. STATEMENT OF THE CASE

1. Summary. On June 7, 2000, Reynaldo Redmond went with some friends to Lindbergh High School (LHS) to meet a friend's brother. 4RP 33; 40; 5RP 25. Mr. Redmond is an alumnus of LHS and is permitted to visit the campus. 5RP 25. As Mr. Redmond was walking through the school parking lot, Bryan Johnson, who was in his car, made eye contact with him, then exited to confront Mr. Redmond. 5RP 26; 2RP 57. A heated argument ensued, with Mr. Johnson gesticulating and screaming obscenities. 5RP 27. As the argument escalated, Mr. Johnson stepped toward Mr. Redmond with his fists clenched. 5RP 27. Feeling threatened, Mr. Redmond swung at Mr. Johnson, fracturing his jaw. 5RP 29-30; 4RP 12. Mr. Redmond testified he was "in fear of what was going to happen to [him]" and felt he like he "couldn't run from [Mr. Johnson]." 5RP 29-30. According to numerous witnesses, Mr. Johnson appeared "really aggressive and angry" and was yelling at Mr. Redmond just prior to approaching Mr. Redmond with his fists clenched. 3RP 26; 85; 4RP 35; 42.

Over defense objection, Mr. Johnson was permitted to testify to hearing from unnamed sources that Mr. Redmond was coming to

the school to look for him. 2RP 59. The court then refused to give a limiting instruction, even though the testimony was not admitted for its truth. 2RP 59-60. Mr. Johnson claimed he got out of his car and confronted Mr. Redmond "to avoid the fight." 2RP 60. He claimed Mr. Redmond swung at him after he had turned to reenter his car. 2RP 62. Other witnesses testified, however, that at the time of the blow, Mr. Johnson was standing with his back to the car, facing Mr. Redmond. 2RP 39. Even though she claimed she was not eliciting the testimony for its truth, in closing argument the prosecutor stressed, "[t]he testimony…of Bryan Johnson about the defendant looking for Bryan Johnson…that evidence is important [because] it goes to the defendant's intent." 5RP 73.

The trial court declined to give a "no duty to retreat" instruction[2] to the jury, even though the defense explained the instruction was critical to the defense theory of the case. CP 10;

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[2] Although no copy of defense proposed jury instructions was filed with the court, the record reflects that Mr. Redmond proposed the WPIC "no duty to retreat" instruction, which states,

> It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that [he] is being attacked to stand [his] ground and defend against such an attack by the use of lawful force. The law does not impose a duty to retreat. WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 17.05, at 205 (2d ed. 1994).

5RP 45-49. Instead, the only instructions relating to self-defense issued by the court were WPICs 16.04, 17.02 and 16.05, which do not inform the jury that an accused has no duty to retreat from an unlawful attack. The prosecutor then argued Mr. Redmond had "the way to get out of the situation," suggesting that such a duty existed. 5RP 61.

Over objection, the trial court also admitted Mr. Johnson's medical records into evidence, which contained an inflammatory description of the incident attributing the cause of Mr. Johnson's injuries to a brutal attack by an ex-student. 5RP 3-8; Ex. 5.

Mr. Redmond was convicted of Assault in the Second Degree. CP 14.

2. Decision of the Court of Appeals. In an unpublished decision, Division One of the Court of Appeals affirmed Mr. Redmond's conviction. Even though the Court identified facts in the record from which the jury could have concluded that retreat was a reasonable alternative to the use of force,[3] the Court decided a "no duty to retreat" instruction "was not necessary because 'retreat was not an issue for the jury.'" Slip Op. at 6-7.

The Court also found Mr. Johnson's testimony that other people had told him Mr. Redmond would come to the school looking for him was admissible because it was offered for a non-hearsay purpose, even though it was argued for its truth at trial. Slip Op. at 2-3; 5RP 73. Finally, the Court determined admission of the unredacted medical records was harmless error. Slip Op. at 4-5. This Court accepted review.

C. ARGUMENT

1. A PERSON WHO IS IN A PLACE WHERE HE HAS A RIGHT TO REMAIN HAS "NO DUTY TO RETREAT" FROM AN IMMINENT THREAT OF FORCE.

a. A "no duty to retreat" instruction must be given whenever the jury can conclude retreat is a reasonable alternative to the use of force in self-defense. This Court has repeatedly upheld an accused's common law right to "stand his ground and repel force with force, even to taking the life of his assailant if necessary or in good reason apparently necessary for the preservation of his own life or to protect himself from great bodily harm." State v. Meyer, 96 Wn. 257, 264, 164 P. 926 (1917). A

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[3] Slip Op. at 1-2. A copy of the opinion is attached as an appendix.

claim of self-defense negates an element of the crime and requires the jury to "evaluate the reasonableness of the defendant's actions in defense of himself 'in the light of all the circumstances.'" State v. Wanrow, 88 Wn.2d 221, 235, 559 P.2d 548 (1977), citing, State v. Tribett, 74 Wn. 125, 132 P. 875 (1913).[4] This Court has resisted efforts to modify or abridge this fundamental right of self-defense. State v. Allery, 101 Wn.2d 591, 596-98, 682 P.2d 312 (1984).

Where an accused has raised self-defense and the jury could conclude flight is a reasonable alternative to the use of force, the jury must be instructed that the accused has no duty to retreat.[5] The rule is an integral component of the right to self-defense in Washington. State v. Hiatt, 187 Wn. 226, 237, 60 P.2d 71 (1936)

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[4] Accord, State v. Ellis, 30 Wn. 369, 70 P. 963 (1902); State v. Churchill, 52 Wn. 210, 100 P. 309 (1909).

[5] The Court of Appeals has suggested a "no duty to retreat" instruction need not be given when the instruction is unnecessary to the defendant's theory of the case and superfluous because the issue of retreat was not raised at trial or the facts show the defendant was in retreat. State v. Wooten, 87 Wn.App. 821, 825, 945 P.2d 1144 (1997). To the extent that this standard conflicts with the unfettered right of self-defense as set forth by this Court, Mr. Redmond questions its accuracy. But see, State v. Benn, 120 Wn.2d 631, 659, 845 P.2d 289, cert. denied, 510 U.S. 944 (1993) (no duty to retreat instruction unwarranted because evidence does not suggest anyone but defendant was the aggressor).

(Court "committed to the rule that one who is where he has a lawful right to be is under no obligation to retreat when attacked").[6]

An accused need not show an actual physical assault to raise self-defense or obtain a "no duty to retreat" instruction. State v. Janes, 121 Wn.2d 220, 241, 850 P.2d 495 (1993). Rather, the evidence need only establish a confrontation or conflict, not instigated or provoked by the defendant, that would induce a reasonable person, considering all the facts and circumstances known to the defendant, to believe that there was *imminent danger* of great bodily harm about to be inflicted. Id., (citing, State v. Walker, 40 Wn.App. 658, 662, 700 P.2d 1168 (1985)).

b. Consistent with this Court's precedent, the broad right of self-defense requires the jury to be instructed that a person acting in self-defense has no duty to retreat. A trial court must issue a "no duty to retreat" instruction whenever there is sufficient evidence to support it. Allery, 101 Wn.2d at 598. This Court requires a trial court to determine whether there is sufficient evidence to support issuance of a defense proposed jury

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[6] See also, State v. Takeshima, 182 Wn. 637, 47 P.2d 994 (1935); State v. Cushing, 14 Wn. 527, 45 P. 145, 53 Am.St.Rep. 883 (1896); Beard v. United States, 158 U.S. 550, 559, 15 S.Ct. 962, 39 L.Ed. 1086 (1895).

instruction by reviewing the entire record in the light most favorable to the defendant with particular attention to those events immediately preceding and including the criminal act. State v. Callahan, 87 Wn.App. 925, 933, 943 P.2d 976 (1997) (citing, Allery, 101 Wn.2d 594); State v. McCullum, 98 Wn.2d 484, 488-89, 656 P.2d 1064 (1983). On review, the Court of Appeals applies a similar standard.[7] Id.

The court is not empowered to weigh credibility. State v. Fernandez-Medina, 141 Wn.2d 448, 460-61, 6 P.3d 1150 (2000). Nor may the court base its assessment solely on the defendant's testimony. "Because the defendant is entitled to the benefit of all the evidence, his defense may be based upon facts inconsistent with his own testimony." Id.

Yet, contrary to this Court's precedent, the Court of Appeals failed to evaluate all of the evidence presented at trial from which the jury could have concluded Mr. Redmond had an opportunity to

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[7] This standard is more deferential than that employed to sustain a directed verdict. A directed verdict is granted when, "after viewing the material evidence in the light most favorable to the nonmoving party, the court determines there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party." State v. Longshore, 141 Wn.2d 414, 420, 5 P.3d 1256 (2000).

retreat instead of using force. See, 2RP 38-39; 62; 3RP 84. Instead the Court erroneously employed a wholly subjective standard, deciding that because Mr. Redmond himself considered retreat was futile, he was precluded from telling the jury it could not evaluate the reasonableness of flight. Slip Op. at 6-7. The Court shifted to Mr. Redmond the burden of proving a conjectural weighing of options prior to acting in self-defense in response to an imminent threat.

Such an expectation is unrealistic. As expressed by former United States Supreme Court Justice Oliver Wendell Holmes, "detached reflection cannot be demanded in the presence of an uplifted knife." Brown v. United States, 256 U.S. 335, 343, 41 S.Ct. 501, 65 L.Ed. 961, 18 A.L.R. 1276 (1921). Evaluating the propriety of the trial court's refusal to give a "no duty to retreat" instruction based on Mr. Redmond's subjective perceptions at the time of imminent conflict was plain error, contrary to the rule of law enunciated by this Court, and thus requires reversal.

i. The trial court's instructions prejudicially implied Mr. Redmond had a duty to retreat. This Court has repeatedly reversed convictions where, in instructing a jury on self-

defense, the trial court implies the defendant had a duty to retreat. State v. Hilsinger, 167 Wn. 427, 9 P.2d 357 (1932) (instruction stating in part, "[w]hen a person is assaulted and the assault is so fierce and imminent that the person assaulted honestly believes and has good reason to believe that he or she cannot retreat without manifestly increasing the danger to himself or herself, such person is not required to retreat" held to be error); State v. Phillips, 59 Wn. 252, 109 P. 1047 (1910) (former rule requiring a man threatened with force to "retreat to the wall or warn his adversary to desist" replaced by broad doctrine imposing no duty to retreat); Meyer, 96 Wn. at 263 (holding instruction "that the defendant was required to retreat if he could do so without increasing the hazard to himself was erroneous, misleading, and confusing [to the jury]"); see also, State v. Lewis, 6 Wn.App. 38, 39-40, 491 P.2d 1062 (1971) (instruction telling jury to consider availability to defendant of means of escape from danger held to be reversible error).

The Court of Appeals disregarded this precedent by concluding the instructions did not suggest a duty to retreat.

Relying on a dictum in State v. Frazier,[8] the Court decided the "instructions as a whole" stated the law correctly and allowed both parties to argue their theories of the case. Slip Op. at 5-6.

This Court has explicitly rejected a simple "instructions read as a whole" approach to the evaluation of jury instructions on self-defense because of the special status accorded a person's right to defend himself from unlawful force with force. State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996) (reversing because of inconsistent self-defense instructions). In light of this special status, this Court has proclaimed that jury instructions on self-defense "must more than adequately convey the law." Id. "Read as a whole, the jury instructions must make the relevant legal standard *manifestly apparent* to the average juror." Id., (emphasis added). "A jury instruction misstating the law of self-defense amounts to an error of constitutional magnitude and is presumed to be prejudicial." Id.

The Court of Appeals failed to engage in the careful scrutiny this Court has required to ensure the law of self-defense is

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[8] 55 Wn.App. 204, 777 P.2d 27 (1989), rev. denied, 113 Wn.2d 1024 (1989).

properly stated to the jury. Rather, the Court of Appeals rationalized that the trial court's self-defense instruction implied that Mr. Redmond did not have a duty to retreat." See, Frazier, 55 Wn.App. at 208.[9]

The Court's assertion that the instructions imply Mr. Redmond had no duty to retreat is specious. The self-defense instruction given by the trial court discusses the right of an accused to use force in self-defense in response to a perceived threat, but is silent on the issue of retreat. Further, a duty to retreat is implied by the trial court's Instruction #15. That instruction states, "[n]ecessary means that, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2)

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[9] In Frazier, the trial court issued the standard self-defense instruction contained in WPIC 17.02, which provides,

> The use of force upon the person of another is lawful when used by a person who reasonably believes that he is about to be injured by someone, and when the force is not more than is necessary.
>
> The person using the force may employ such force as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident. (cont'd on next page)
>
> The state has the burden of proving beyond a reasonable doubt that the force used by the defendant was lawful.

The jury was issued a nearly identical instruction in the instant matter. CP 31.

the amount of force used was reasonable to effect the lawful purpose intended." CP 32.

In the absence of a "no duty to retreat instruction", an average juror analyzing the language, "no reasonably effective alternative to the use of force appeared to exist" would believe the most reasonable alternative to force to be flight. Without the issuance of a "no duty to retreat" instruction, the "no reasonably effective alternative to force" instruction conflicts with this Court's self-defense jurisprudence. The failure to give the instruction raises the presumption that Mr. Redmond had a duty to retreat, which is a clear misstatement of the law.

This Court has held that such clear misstatements are presumed to be prejudicial:

> When instructions are inconsistent, it is the duty of the reviewing court to determine whether "the jury was misled as to its function and responsibilities under the law" by that inconsistency.... [W]here such an inconsistency is the result of a clear misstatement of the law, the misstatement must be presumed to have misled the jury in a manner prejudicial to the defendant.

State v. Walden, 131 Wn.2d 469, 478, 932 P.2d 1237 (1997), (citing, Wanrow, 88 Wn.2d at 239). Because the instructions

provide an incorrect statement of the law and encourage an unfair result, reversal is required.

ii. Mr. Redmond was prevented from arguing his theory of the case. The trial court is obligated to give instructions to the jury that, taken as a whole, properly instruct the jury on the applicable law and allow each party to argue his or her theory of the case. State v. Clausing, 147 Wn.2d 620, 626, 56 P.3d 550 (2002); State v. Cyrus, 66 Wn.App. 502, 832 P.2d 142, review denied, 120 Wn.2d 1031 (1993). In this case, Mr. Redmond's counsel explained the "no duty to retreat" instruction was "critical" to arguing Mr. Redmond's theory of the case. 5RP 45-49; CP 10. Mr. Redmond was in a place where he had a right to remain when the confrontation with Mr. Johnson took place. He had every right to approach Mr. Johnson and speak, and even argue, with him. When the fight ensued, Mr. Redmond had no obligation to "get out" of the situation, as suggested by the prosecutor. But the jury was not instructed on this basic principle.

Mr. Redmond's right to present a defense and argue his theory was obstructed when the trial court refused to instruct the

jury he had no duty to retreat from Mr. Johnson's threat of force. The conclusion of the Court of Appeals to the contrary was error.

c. The appropriate remedy is reversal and remand for a new trial. A trial court's failure to issue a "no duty to retreat" instruction is reversible error, unless the Court is convinced beyond a reasonable doubt it is an error that is *trivial,* or *formal,* or *merely academic,* and *in no way affected the final outcome of the case.*" State v. Wooten, 87 Wn.App. at 826, (citing, Wanrow, 88 Wn.2d at 237 (emphasis added)); see also, State v. Riley, 137 Wn.2d 904, 908 n. 1, 976 P.2d 624 (1999) (a trial court's failure to give a jury instruction that is supported by substantial evidence and necessary to allow either side to argue its theory of the case is prejudicial error, requiring reversal and remand for a new trial).

The failure to provide the proper instruction cannot be considered merely academic. The fact that the jurors could have concluded that flight was a reasonably effective alternative to the use of force is apparent because the prosecutor told them it was. The prosecutor's legally erroneous suggestion likely seemed reasonable, as the confrontation between Mr. Redmond and Mr. Johnson occurred in an open space. The error thus invited a

verdict based on improper considerations, violating this Court's long-standing protection of a person's right to use self-defense when threatened in a place where he has a right to remain.

Because the instructional error was not trivial or harmless, and prevented Mr. Redmond from arguing his theory of the case, this Court should reverse the decision of the Court of Appeals and remand for a new trial.

2. IN VIOLATION OF MR. REDMOND'S CONSTITUTIONAL RIGHT TO CONFRONT HIS ACCUSERS, THE TRIAL COURT ADMITTED PREJUDICIAL HEARSAY, WHICH WAS ARGUED FOR ITS TRUTH, AND REFUSED A LIMITING INSTRUCTION.

a. The statements from unnamed declarants about Mr. Redmond's intent in coming to the school were inadmissible hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). In narrowly defined circumstances, a hearsay statement may be offered for a non-hearsay purpose. State v. Terrovona, 105 Wn.2d 632, 642, 716 P.2d 295 (1986) (hearsay statement of decedent's intentions admissible for limited purpose of showing he acted in conformance with those intentions). Hearsay statements offered to show the state of mind of the declarant are admissible only if relevant and trustworthy. State v. Parr, at 98-99. "[I]f the circumstances do not import trustworthiness, such evidence may be inadmissible unless there is some other corroborating evidence." Id. Even if corroborating evidence is present, limiting instructions are required to curtail abuse derived from admission of such statements. Parr,

93 Wn.2d at 99; Thomas v. French, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983).

Over strenuous objection, the trial court permitted Mr. Johnson to testify that he knew Mr. Redmond was angry at him and was coming to LHS to confront him based upon rumors repeated by unnamed "people" at the school. 2RP 59-60. The court did not require the prosecutor to articulate a relevant non-hearsay purpose for the admission of the statements and refused to issue a limiting instruction. 2RP 59-60.

The failure to identify a relevant purpose for the admission of hearsay statements is evidence in itself that the declarations are offered for their truth. State v. Aaron, 57 Wn.App. 277, 280, 787 P.2d 949 (1990). The state belatedly claimed on appeal the statements "demonstrated Johnson's state of mind prior to the confrontation with Redmond in the parking lot." Brief of Respondent (BOR) at 11.[10] The state contended "Johnson's

[10] On appeal, Respondent argued the testimony was admissible pursuant to ER 803(a)(3) which provides that a statement of the "declarant's then existing state of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)" is an exception to the hearsay rule set forth in ER 801(c). However, as noted by the Court of Appeals, the state of mind of the unnamed declarants who spoke to Johnson was not relevant to this case. Slip. Op. at 3.

actions were made relevant by Redmond's claim of self-defense", apparently to rebut the claim Johnson was the first aggressor. BOR at 17. This is a disingenuous contention. At trial, the prosecutor did not argue the statements had any relevance to Mr. Johnson's state of mind. Instead, she explicitly argued the statements were relevant to show Mr. Redmond's intent. 5RP 73. Because the unsubstantiated declarations from unnamed declarants were introduced for the truth of the matter asserted, they were inadmissible hearsay.

b. <u>The statements were used and argued for their truth, although purportedly admitted for a non-hearsay purpose</u>. Notwithstanding the prosecutor's failure to articulate any relevant purpose for the statements' admission in the record, and her unequivocal argument that "[t]he testimony…of Bryan Johnson about the defendant looking for Bryan Johnson… is important [because] it goes to the defendant's intent", the Court of Appeals tranquilly accepted Respondent's unsupported claim that the statements did not constitute hearsay. Slip Op. at 2-4. This conclusion was error.

On appeal, the Court reviews the admission of evidence by a trial court for an abuse of discretion. State v. C.J., __ Wn.2d __, 63 P.3d 765, 772 (2003). A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable reasons or grounds. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). The Court of Appeals apparently concluded admission of the statements from unnamed declarants to Mr. Johnson was not an abuse of discretion because the declarations could have been offered for a non-hearsay purpose. The problem with the Court's analysis is that the trial court's failure to require the prosecutor to identify a relevant purpose for the admission of the evidence removes the possibility that any limiting instruction could have been given.

i. The admission of the evidence was subject to the general relevancy requirements of ER 403. "Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Irrelevant evidence is inadmissible. ER 402. Even relevant evidence may be excluded "if its probative value is

substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ER 403.

Although the text of the rule requires the trial court to engage in a balancing process, Washington courts have not yet required trial judges to engage in an on-the-record balancing as is mandated under ER 404(b) and ER 609. 5 K. Tegland, Wash. Prac., Evidence, § 403.2 at 352 (4th Ed. 1999); State v. Gould, 58 Wn.App. 175, 791 P.2d 569 (1990).

Where the prosecutor claimed the evidence was offered for a relevant, non-hearsay purpose,[11] it was incumbent on the prosecutor to identify the reason for admission so as not to invite timorous guesswork on appeal. See, e.g., State v. Rupe, 101 Wn.2d 664, 683 P.2d 571 (1984), appeal after remand, 108 Wn.2d 734, 743 P.2d 210 (1987) (emotional 911 tape admitted to rebut defense claims in opening statement); 5B K. Tegland, Wash. Prac., Evidence, § 803.15 at 454 (4th Ed. 1999) (where out-of-court declaration is offered to show effect on hearer, hearer's state of

mind must be relevant; if state of mind of hearer irrelevant to issues at trial, statement is hearsay).

ii. Mr. Johnson's state of mind when he exited his car was irrelevant. The hearsay statements had no relevant non-hearsay purpose. The Court of Appeals asserts "Johnson's state of mind and motivation were relevant since the State needed to show that he was not the aggressor in order to meet its burden of disproving self-defense." Slip Op. at 4. The Court reasons, "[a]fter describing what he had been told, Johnson ultimately testified that he got out of his car to try to talk to Redmond about the rumors and to prevent damage to his car." Id.

But Mr. Redmond does not contend Mr. Johnson was the aggressor when he stepped out of his car to confront Mr. Redmond. Rather, the dispositive act invoking the need for self-defense occurred when Mr. Johnson advanced on Mr. Redmond with his fists clenched in a threatening manner. That action occurred *after* Mr. Johnson exited his car and *after* he argued with Mr. Redmond. The contested statements have no relevance to explaining the escalation of the conflict from a discussion "about

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[11] 2RP 59.

the rumors" to a fistfight, and consequently, should have been excluded.

c. Admission of hearsay without a limiting instruction violated this Court's precedent and deprived Mr. Redmond of his constitutional right to confront his accusers.

i. Limiting instructions must be given as a matter of right when requested. When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly. ER 105. When they are requested by the defense, this Court has repeatedly required limiting instructions to accompany the admission of hearsay in a jury trial. Parr, 93 Wn.2d at 99; Raborn v. Hayton, 34 Wn.2d 105, 110, 208 P.2d 133 (1949); see also, State v. Freeburg, 105 Wn.App. 492, 502, 20 P.3d 984 (2001); 5 K. Tegland, § 105.2 at 109 ("[a] limiting instruction is available as a matter of right").

ii. This Court requires limiting instructions to safeguard an accused's rights under the Confrontation Clause. At least one of the purposes of issuing limiting instructions is to

safeguard the rights of a defendant to confront the witnesses against him. U.S. Const. amend 6. In some instances, even limiting instructions may be insufficient to guard against the prejudice to an accused's Sixth Amendment right to confrontation. Parr, 93 Wn.2d at 99; Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), appeal after remand, 416 F.2d 310 (8th Cir. 1969), cert. denied, 397 U.S. 1014 (1970).

But the Court of Appeals overlooked the trial judge's failure to issue the limiting instruction requested by the defense and so disregarded this Court's precedent. Parr, 93 Wn.2d at 99; State v. Kontrath, 61 Wn.2d 588, 591-92; 379 P.2d 359 (1963); Raborn, 34 Wn.2d at 110. The Court thus denied Mr. Redmond the right to confront the witnesses against him, namely, the unnamed rumor-mongers who speculated about Mr. Redmond's purpose in coming to LHS.

Further, the Court displayed an apparent indifference to its own precedent, where it has unambiguously held that a failure to give a limiting instruction when requested is error. Freeburg, 105 Wn.App. at 502; Aaron, 57 Wn.App. at 281-82. In fact, the Court wholly evaded discussion of Mr. Redmond's contention that a

limiting instruction was necessary. Appellant's Reply Brief at 4. The trial court's failure to give a limiting instruction to the jury despite Mr. Redmond's timely request for such an instruction invited consideration of the testimony for its truth. The decision of the Court of Appeals suggesting otherwise represents a dangerous erosion of fundamental constitutional principles of confrontation and fairness, and should be reversed.

iii. This issue is properly before this Court for review. Mr. Redmond addressed the trial court's failure to issue a limiting instruction in his reply brief. As the court's error implicates his rights under the Confrontation Clause, this Court may consider it for the first time on review. State v. Leach, 113 Wn.2d 679, 692, 782 P.2d 522 (1989) (constitutionality of charging document raised for first time on discretionary review to Court of Appeals); see also, RAP 1.2(a); State v. Olson, 126 Wn.2d 315, 318-19, 893 P.2d 629 (1995) (a minor technical violation of the Rules of Appellate Procedure that results in no prejudice to the other party and minimal inconvenience to the appellate court should be overlooked and the issue decided on its merits). Because this issue was raised below by defense counsel's proper and timely objection,

discussed in Appellant's Reply Brief, and implicates constitutional rights, it is properly before this Court.

d. Admission of the evidence was prejudicial. Because admission of the hearsay testimony implicated Mr. Redmond's rights under the Confrontation Clause, this Court applies the deferential standard on review required for assessing constitutional error. Constitutional error is presumed to be prejudicial and the State bears the burden of proving the error was harmless. State v. Stephens, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980). Error is harmless unless the Court is convinced beyond a reasonable doubt that the jury's verdict would have been the same absent the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

In this case, the error caused by the admission of the hearsay statements was not harmless. The statements depict Mr. Redmond as predatory and vengeful. The prosecutor utilized the statements to suggest Mr. Redmond had the intent of fighting with Mr. Johnson before he came to the school, completely discrediting Mr. Redmond's self-defense claim. 5RP 73. Although another

witness testified she saw Mr. Redmond looking into cars,[12] that testimony alone does not have the damning implications of the anonymous hearsay.

Absent admission of the hearsay, issuance of a proper limiting instruction, and the prosecutor's improper argument, a jury could have easily determined Mr. Johnson was the first aggressor, and acquitted Mr. Redmond. Reversal is required.

3. ADMISSION OF UNREDACTED MEDICAL RECORDS CONTAINING AN ATTRIBUTION OF FAULT DEPRIVED MR. REDMOND OF A FAIR TRIAL.

a. The statement in the medical record was inadmissible hearsay. Pursuant to ER 803(a)(4), "[s]tatements made for purposes in medical diagnosis or treatment and describing medical history, or past and present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment" are not excluded by the hearsay rule. Neutral statements of causation are generally admissible. See, 5B K. Tegland, Wash. Prac., Evidence, §803.23 at 468-69 (4th Ed.

[12] 3RP 81.

1999).[13] But statements attributing fault are inadmissible hearsay unless they are relevant to prevent recurrence of injury. State v. Huynh, 107 Wn.App. 68, 75, 26 P.3d 290 (2001); State v. Butler, 53 Wn.App. 214, 217, 766 P.2d 505, rev. denied, 112 Wn.2d 1014 (1989).

The records in this case contained the statement, "an ex-student accosted and dragged Mr. Johnson from his auto and slammed his head into the dash several times, resulting in current injuries." Ex. 5. There is no dispute that the "ex-student" to whom the report refers is Mr. Redmond. The allegation in the records is a clear attribution of fault, rather than a neutral statement of causation. The statement was inadmissible hearsay, and should have been redacted.

b. Admission of the statement was an abuse of discretion. Under any reasonable interpretation, the trial court's failure to redact the statement in the records containing the attribution of fault was an abuse of discretion. See, State ex rel Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) (weighing

[13] Tegland proposes the following example to distinguish statements of causation from attributions of fault: ("I was hit in the face") versus ("Uncle Joe was beating me").

competing interests in determining whether discretion was exercised on untenable grounds or was manifestly unreasonable).

In assessing the admission of attributions of fault, the threshold question on review is whether the statement was "reasonably pertinent" to treatment. State v. Sims, 77 Wn.App. 236, 239-40, 890 P.2d 521 (1995) (victim's statement attributing fault to a cohabitant held to be pertinent to physician's treatment due to possibility of recurrence of injury); Butler, 53 Wn.App. at 221-22, citing, United States v. Renville, 779 F.2d 430 (8th Cir. 1985) (toddler's statement that "daddy" had caused injuries held to be pertinent to treatment). The reasoning in both cases is that the domestic relationship between the abuser and the victim was relevant to prevention of further injury and thus would have a bearing on the treating physician's recommendations. Sims, 77 Wn. App at. 239-40; Butler, 53 Wn.App. at 222-23.

Here, the likelihood of recurrence of injury was negligible or nonexistent. Thus, there is no justification for admission of the records. As such, the trial judge's decision was manifestly unreasonable.

c. The admission of the statement did not assist the defense. In its decision, the Court of Appeals skirted the question of whether the trial court's decision to admit the records was an abuse of discretion, finding any error was "clearly harmless." Slip Op. at 5. The Court reasoned "the report was inconsistent with every other account of the incident described at trial" and found, "this inconsistency could have impeached Johnson's story and raised doubt in the jury's mind about the truth of his claim." Slip Op. at 5.

The Court ignores the testimony of witness Mariah Saxton, who claimed Mr. Redmond "was hitting Bryan's head against the car window and door, was like smashing it in there"[14] and the prosecutor's theory that Mr. Redmond was the first aggressor. The prosecutor argued that Mr. Redmond "continued to smash Bryan Johnson's head into the car"[15] to illustrate her contention that Mr. Redmond started the fight. Rather than impeaching Mr. Johnson's story, the statement bolstered the state's theory.

The prosecutor did not argue admission of the statement would help Mr. Redmond's defense. Defense counsel clearly

objected to the admission of the statement. 4RP 23-25; 5RP 3-9. And the trial judge – who was in the best position to evaluate the dynamics of a jury trial – did not mention any benefit to the defense in making his decision. State v. Harris, 97 Wn.App. 865, 869, 989 P.2d 553 (1999), rev. denied, 140 Wn.2d 1017 (2000) (trial judge in best position to judge prejudicial effect of evidence). The Court of Appeals's conclusion is contradicted by the record and requires the appellate court to second-guess defense counsel's strategy.

The Court also noted, "[t]he statement does not refer to Redmond by name, and is qualified by the word "apparently," indicating the writer was not endorsing Johnson's statement." Slip Op. at 5. The subtlety of the Court's grammatical analysis may well have been lost on the jurors, in light of the vivid description of the "ex-student's" violent attack. The hearsay account of the attack was inadmissible and brutally prejudicial. The Court's determination that its admission was "clearly harmless" was error.

D. CONCLUSION

In this matter, reversal is required on two grounds. First, the trial court's failure to instruct the jury that Mr. Redmond had no duty

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[14] 2RP 40.

to retreat precluded him from arguing his theory of the case and encouraged the jury to conclude flight was a reasonable alternative to the use of force. Second, the court's admission of two prejudicial hearsay accounts of Mr. Redmond's intent and actions provided support for the prosecutor's theory that Mr. Redmond was the aggressor. It is reasonably probable that if the errors had not occurred, the jury would have reached a different verdict. Thus under the cumulative error doctrine, reversal is required. State v. Russell, 125 Wn.2d 24, 93, 882 P.2d 747 (1994) (even where no single error, standing alone, mandates reversal, reversal may nonetheless be necessary where it appears reasonably probable that the cumulative effect of those errors materially affected the outcome). Mr. Redmond respectfully requests that this Court reverse the decision of the Court of Appeals and remand this case for a new trial.

DATED this ____ day of April, 2003.

Respectfully submitted:

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Susan F. Wilk (WSBA 28250)

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[15] 4RP 74.

Washington Appellate Project (91052)
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